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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1928.

No. .

GULF REFINING COMPANY,
Petitioner,
(Libelant-Appellee below),

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent,
(Respondent-Appellant below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Gulf Refining Company, respectfully shows to the Court as follows:

STATEMENT.

This is a petition for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit. A written opinion was handed down (R. 189-194), and the order for mandate was filed on July 24, 1928 (R. 195).

The decree which it is sought to review was entered in a suit in admiralty brought to recover a balance alleged to be due to your petitioner by reason of a general average loss under a policy of marine war risk insurance issued by respondent. The case was brought originally in the District Court for the Southern District of New York. With the consent of the parties, the District Court referred the case to a commissioner to hear and report on all issues. The commissioner held in favor of your petitioner, filing a report (R. 160-179). The District Court confirmed the commissioner's report and entered a final decree in favor of your petitioner (R. 181-183). The Circuit Court of Appeals has reversed the commissioner and the District Court and has decided in favor of respondent.

The Facts.

The facts are essentially undisputed, being almost entirely admitted in the pleadings or by stipulation (R. 2-11, 152-160).

Your petitioner is the successor in interest to the owners of a large cargo of gasolene shipped on April 10, 1915, from Port Arthur, Texas, bound for Rouen, France, on board the Steamship *Gulflight*.

Respondent insurance company issued a policy of war risk insurance covering this cargo for the voyage above mentioned. By this policy, the owners of the cargo were insured in the sum of $27,690, the cargo being valued in the policy at $212,000. In other words, respondent by this policy insured 27690/212000ths, or approximately 1/8th, of the cargo risk.

In the course of the voyage, the *Gulflight* was torpedoed near the Scilly Islands by a German submarine. The damage done by the torpedo was serious, but it did not prove

fatal. After the making of various extraordinary sacrifices and expenditures for the common safety, the voyage was completed and the cargo delivered at Rouen on June 18, 1915.

To make good these extraordinary sacrifices and expenditures made for the common safety, a general average was stated according to law and contributions were assessed against the various interests at risk. The cargo in question was assessed $49,088.04, this being its proper share based on a contributory value of $417,178. The contributory value was the actual value of the cargo saved at the place and time of the termination of the venture. No question is raised as to the propriety of the general average adjustment.

Your petitioner duly paid the general average contribution assessed against the cargo and then asked indemnity from respondent insurance company for the same proportion thereof as respondent's underwriting bore to the agreed policy value, viz., approximately one-eighth.

Respondent, however, refused to indemnify your petitioner to this extent, claiming that as the contributory value exceeded the agreed policy value, it should only pay that portion of the amount claimed by your petitioner which the agreed policy value bore to the contributory value.

Respondent paid and your petitioner received this lesser amount without prejudice. Your petitioner sues herein for the balance.

The Question Involved.

The sole question presented in this case is whether, where cargo, insured under a valued policy, suffers from a peril insured against through being assessed a general average contribution based on a contributory value in ex-

cess of the agreed policy value, the insured should recover complete indemnity from his underwriters, or only partial indemnity in the proportion which the agreed policy value bears to the contributory value.

In a broad sense this question is a question of construction of the contract of insurance. But the policy herein, and cargo insurance policies generally, do not contain any provisions directly applicable. The question, therefore, is one of general importance and must be referred for solution to the general principles, usages and authorities governing the construction of contracts of marine insurance.

Reasons for Granting Writ.

1. The decision herein of the Circuit Court of Appeals for the Second Circuit is directly opposed to the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Maldonado & Company* v. *British and Foreign Marine Insurance Company*, 182 Fed. 744 (1910) *certiorari denied*, 220 U. S. 622.

This conflict is specifically recognized by the court in its opinion (R. 192).

The effect of the conflict is aggravated by the fact that the decision in the Ninth Circuit is essentially a decision on New York law. When that case came before that court sitting in California, there were in that jurisdiction no decided cases bearing upon the question. It was, therefore, necessary for the court to inquire into the source of the California law. This the court proceeded to do and came to the conclusion that the California law was based upon the New York law, so far as concerns payment of general average losses by marine underwriters. The decision, therefore, is in effect a decision on New York law.

The conflict between the two decisions is complete.

2. The decision herein of the Circuit Court of Appeals for the Second Circuit is directly opposed to the decision of the Supreme Court of Judicature of the State of New York in *Strong et al.* v. *New York Firemen Insurance Company*, 11 Johnson 323 (1814).

This conflict is also specifically recognized by the court in its opinion (R. 192). It is true that in this New York case the court dismissed defendant underwriters' contention that they were only liable for partial indemnity with few words; nevertheless the report of defendant's argument shows clearly that the court did decide after full argument the precise question herein involved.

New York is the great centre of American marine underwriting, and there has been developed in the local courts a very considerable body of law covering marine insurance transactions. Your petitioner respectfully submits that this Court ought to review the decision herein of the Circuit Court of Appeals which, not only, is not supported by any local decisions, but directly conflicts with the precedent established one hundred and fourteen years ago by the highest court of the state.

3. Although the question as to the amount of recovery on general average losses under marine insurance policies has been the subject of considerable litigation for more than a century, the rationale of the decision sought to be reviewed is unique and out of accord with all pre-existing authority on the subject. The brief submitted herewith will elucidate this point.

4. With the decision sought to be reviewed herein there are now established within the United States three dif-

ferent and conflicting rules governing the recovery of general average losses under policies of marine insurance.

(a) In the Ninth Circuit and in the state courts of New York, the so-called New York or American rule has been established. *Maldonado & Company* v. *British and Foreign Marine Insurance Company*, 182 Fed. 744 (1910), *Certiorari denied*, 220 U. S. 622; *Strong* v. *New York Firemen Insurance Company*, 11 Johnson 323 (1814); *Providence and Stonington Steamship Company* v. *Phoenix Insurance Company*, 89 N. Y. 559 (1882).

(b) In Massachusetts the so-called Boston or English rule has been established. *Clark* v. *United Fire & Marine Insurance Company*, 7 Mass. 364 (1811).

(c) The present decision establishes for the Second Circuit a new rule, half "Boston" and half "New York". The "New York" rule is to be applied to hull insurance, the "Boston" rule to cargo insurance.

The resulting situation is naturally complete confusion.

Your petitioner respectfully submits that an authoritative pronouncement from this Court is vitally necessary to remove the confusion which this case creates, and to establish an orderly practice of settling insurance claims of this character, as well as to throw much needed light on the theory of the law of valued policies.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit commanding said court to certify and send to this Court on a day designated for its review and determination, a full and complete transcript of the record and of all proceedings

in said United States Circuit Court of Appeals had in said cause entitled in that court, *Gulf Refining Company*, Libelant-Appellee v. *Atlantic Mutual Insurance Company*, Respondent-Appellant; to the end that the said cause may be reviewed and determined by this Court as provided by law; that the said judgment of the United States Circuit Court of Appeals for the Second Circuit herein may be reversed; and that your petitioner may have such other and further relief as may be just.

And your petitioner will ever pray, etc.,

GULF REFINING COMPANY,
BY IRA A. CAMPBELL,
Proctor for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

GULF REFINING COMPANY,
Petitioner,
(Libelant-Appellee below),

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent,
(Respondent-Appellant below).

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT UNDER RULE 25.

The opinion of the Commissioner appointed by the District Court to hear and report (R. 160-179) is reported only in 1927 Am. Mar. Cas. 1669.

In confirming the Commissioner's report (R. 181) the District Court did not write any opinion.

The opinion of the Circuit Court of Appeals reversing the District Court and the Commissioner (R. 189-194) is reported in 27 Fed. (2d) 678, and 1928 Am. Mar. Cas. 1371.

The decree of reversal and order for mandate of the Circuit Court of Appeals was filed on July 24, 1928 (R. 195).

Jurisdiction of this Court is invoked under the Act of February 13, 1925. See *Hamilton Shoe Company* vs. *Wolf Brothers*, 240 U. S. 251.

The facts are fully stated in the petition, as is also the question involved.

Preface to Argument.

It is not attempted in the petition or in this brief to argue the correctness of the decision sought to be reviewed. We purpose here only to show briefly the legal background of the case and the conflicting decisions on the point involved, to the end that this Court may be advised that its authoritative pronouncement on the question is greatly needed.

I.

Marine Policies.

The policy in question is a war risk policy and the loss (torpedoing) was due to a war risk. The principles involved, however, are precisely the same as would have been involved had the policy covered general marine risks, and had the loss been due to some common marine risk such as a peril of the sea. Counsel have not contended, nor has either of the lower courts suggested, that any distinction in principle is to be made, so far as this case is concerned, between war risk and general marine policies.

Marine insurance is commonly written covering cargoes and covering vessels. The policies covering cargo we call herein "cargo policies", and policies on vessels we call "hull policies".

Most marine insurance is written through valued policies, that is policies in which the value of the thing insured is agreed upon between the insured and the underwriters and such value is stated in the policies. Such agreed value

is, in the absence of fraud or mistake, conclusive. 38 *Corpus Juris* 1123.

One underwriter does not usually cover the whole risk, but only part of it. For example, in the case at bar, the respondent insured $27,690 on the cargo valued at $212,000. For his complete protection, an assured must get enough policies so that the whole of the agreed value is covered. Otherwise he becomes a co-insurer for the uncovered portion of the agreed value and, as such, has himself to bear a portion of each loss.

II.

The Settlement of Particular Average Losses Under Marine Policies.

Particular average is the name applied to any partial loss attributable to a peril insured against and not of a general average nature.

Although the policies may be in identical terms, there is a settled distinction in law and in practice between the settlement of particular average losses on hull policies and on cargo policies. This matter is fully covered in the noted opinion of Judge Addison Brown in *International Navigation Company* v. *Atlantic Mutual Insurance Company*, 100 Fed. 304 (S. D. N. Y. 1900), *affirmed on opinion below*, 108 Fed. 987, *certiorari denied*, 181 U. S. 623, commonly known as the *St. Paul Case*.

The following rules are laid down by Judge Brown:

In case of a particular average loss on a valued hull policy, the underwriters pay the full amount of that particular average loss (not exceeding the amount insured) without any inquiry as to the percentage of loss, or as to whether the actual value of the ship exceeded the insured

value or not. Thus, if the shipowner has his vessel insured for $100,000 valued at $100,000, and she suffers damage from marine perils which requires $20,000 to repair, the underwriters pay the shipowner a loss of $20,000, irrespective of how much the vessel was actually worth or what the percentage of loss might have been.

In case of a particular average loss on a valued cargo policy, however, the underwriters do not pay on the basis of the actual loss to the assured. The *percentage* of loss is ascertained by comparison at destination of damaged value with sound value, and the underwriters pay that percentage of the insured value. Thus, if the cargo owner insures goods for $10,000 valued at $10,000 and the goods come into port damaged to the extent of 40% of their value, the underwriters pay a loss of 40% of $10,000, or $4,000. It may be that the goods were undervalued in the policy, or that their value increased during transit, so that when they arrived they would have been worth $15,000 in sound condition. The cargo owner, therefore, has suffered an actual loss of 40% of $15,000, or $6,000. Nevertheless, the policy value is conclusive, as between the assured and the underwriter, and the assured only collects $4,000. On the other hand, it may be that the goods depreciated in value, and on arrival would have been worth only $7,000 sound. In that case, the cargo owner has suffered an actual loss of only $2,800, but since the policy value is conclusive, he recovers $4,000 from his underwriters.

The reasons for this distinction between payments of particular average losses on hull policies and on cargo policies are considered at length by Judge Brown in the *St. Paul Case* (100 Fed. 323-4). On page 323 he says:

> "In the cases of partial loss, the different rule applied to goods and freight from that applied to

ships, has not arisen from any theoretical or even logical construction of the policy; but from practical considerations, having reference to the different purposes in insuring, the different circumstances of the subjects of insurance and the evident difference in the appropriate measure of indemnity.

"The reason assigned by Lord Mansfield for the rule as respects goods, was in order that the proportion of the insurance chargeable to the insurers on a partial loss, might be the true proportion of the merchant's actual loss by the sea peril, and not fluctuate with the market price or profits, but be the same proportion, whether the goods came to a rising or a falling market. See, also, 2 Arn. Ins. (6th Ed.) pp. 928-933."

III.

General Average Losses.

General average, in its original application as between the parties jointly engaged in a maritime venture, has nothing to do with marine insurance. It is simply an adjustment between the parties to the venture for the purpose of imposing upon all equally an extraordinary loss which one has sustained for the common safety and benefit.

From the standpoint of a cargo owner, a general average contribution is a charge levied upon his cargo because other goods or money has been sacrificed or spent to save the venture as a whole, including his cargo. This contribution constitutes a lien on the cargo which must be paid or secured by the cargo owner before he may take possession.

General average claims under marine insurance policies arise after and subsidiarily to the primary rights between

the parties to the venture. Thus, if the general average charges were caused by or through a peril insured against, then the debt which the goods have incurred by reason of the lien for contribution to these general average charges is a loss which the assured has suffered through a peril insured against and is collectible from his underwriters. 38 *Corpus Juris* 1113.

In the case at bar, the general average charges were caused through the torpedoing of the *Gulflight* by a German submarine. This was a war risk. Respondent's policy on petitioner's goods covered against war risks. Respondent is, therefore, liable to reimburse petitioner for the general average charges assessed against petitioner's goods.

IV.

The Cases Covering Settlement of General Average Losses Under Marine Policies Are in Complete Confusion.

While the practice of settling particular average claims under valued marine policies has long been definitely established, the practice of settling general average claims has, as we shall show, come in this country to a state of complete confusion.

In cases where the actual or contributory value of the thing insured differs from the policy value, three different rules for settlement have been suggested:

(a) *Rule of full indemnity.* Under this rule, the underwriters give the assured complete indemnity (not exceeding the amount insured) without inquiry as to whether the policy value differs from the contributory value.

(b) ***Rule of proportionate indemnity.*** Under this rule the underwriters inquire as to the contributory value. If the contributory value exceeds the insured value, then they only give the assured indemnity in the proportion that the insured value bears to the contributory value. If the insured value is greater than the contributory value, the rule, applied rigorously, would give the assured more than indemnity. No case has ever extended the rule this far, but the possibility is discussed by the Circuit Court of Appeals in its decision in the case at bar (R. 192).

(c) *Full indemnity on hull insurance and proportionate indemnity on cargo insurance.*

This rule is a mixture of the two above, making a distinction between settlements under hull policies and under cargo policies under a supposed analogy to the distinction made in the settlement of particular average losses.

All three of these conflicting rules are supported by decisions in the United States at the present time.

The *rule of full indemnity*, which has been called the New York or American Rule, is established for the Ninth Circuit and for the state courts of New York as to both hull and cargo. *Maldonado & Company* v. *British & Foreign Marine Insurance Company*, 182 Fed. 744 (1910); *certiorari denied* 220 U. S. 622; *Providence & Stonington Steamship Company* v. *Phoenix Insurance Company*, 89 N. Y. 559 (1882); *Strong* v. *New York Firemen Insurance Company*, 11 Johnson 323 (1814).

The *rule of proportionate indemnity* (as applied to cases where the contributory value exceeds the insured value), which has been called the English or Boston Rule, is established as to both hull and cargo for the state courts of Massachusetts and in England by statute. *Clark* v.

United Fire & Marine Insurance Company, 7 Mass. 364; *English Marine Insurance Act of 1906, Sec. 73.*

The decision of the Circuit Court of Appeals in the case at bar now establishes the *mixed rule* for the Second Circuit. That court had already committed itself to the *rule of full indemnity* on hull policies. *International Navigation Company* v. *Atlantic Mutual Insurance Company*, 100 Fed. 304; *affirmed on opinion below*, 108 Fed. 987; *certiorari denied*, 181 U. S. 623; *International Navigation Company* v. *Sea Insurance Company*, 124 Fed. 93; *affirmed* 129 Fed. 13. The present decision would now establish the *rule of proportionate indemnity* as to cargo, thus creating the *mixed rule*. Prior to this decision the *mixed rule* had never, so far as we can find, been applied anywhere.

The decision sought to be reviewed is, in its rationale, unique and without precedent anywhere and specifically conflicts with the rationale of the decisions in the Ninth Circuit, in the highest court of New York, and in the highest court of Massachusetts. Furthermore, the decisions in the Ninth Circuit and New York on the one hand, and in Massachusetts on the other hand, conflict between themselves.

Respectfully submitted,

Ira A. Campbell

Ira A. Campbell,
Proctor for Petitioner.

New York, October 15th, 1928.